

² The Board notes that, following the June 25, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On February 1, 2017 appellant, then a 43-year-old city carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on January 26, 2019 she fractured her left ankle and left tibia when she slipped and fell backwards while in the performance of duty. OWCP accepted the claim for an unspecified closed fracture of the shaft of the left fibula. On January 31, 2017 appellant underwent an OWCP-authorized open reduction and internal fixation of the fibula. OWCP paid her wage-loss compensation in the supplemental rolls from March 13 through July 21, 2017.

On May 11, 2017 a nurse practitioner indicated that appellant could return to her regular duties without restriction.

On August 8, 2017 appellant filed a claim for compensation (Form CA-7) due to disability from work for the period July 22 through August 4, 2017. On August 23, 2017 she filed a CA-7 form requesting compensation for employment-related disability from August 5 through 18, 2017. Appellant continued to submit CA-7 forms requesting wage-loss compensation due to disability.

In a report dated August 30, 2017, Dr. Hillary Tudor, a podiatrist, evaluated appellant for left ankle pain and discussed her history of injury, including a January 31, 2017 open reduction and internal fixation of the ankle. On examination she found full strength and motion without pain or crepitus and pain on palpation of the lateral distal fibula of the left ankle. Dr. Tudor diagnosed an unspecified fracture of the left fibula. On September 28, 2017 she found that appellant could work limited duty standing less than 15 minutes each hour.

By decision dated October 17, 2017, OWCP denied appellant's claim for disability from work commencing July 22, 2017. It noted that she had been released to full-time regular work on May 11, 2017, but had not returned.

On October 31, 2017 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

On December 15, 2017 Dr. Tudor surgically removed the hardware in appellant's left ankle.

OWCP paid appellant wage-loss compensation for total disability on the supplemental rolls beginning December 15, 2017 and on the periodic rolls beginning July 22, 2018.

Following an April 17, 2018 telephonic hearing, by decision dated June 18, 2018, OWCP's hearing representative affirmed the October 17, 2017 decision. She found that appellant had not established disability from work for the period July 22 to December 14, 2017 causally related to her January 26, 2017 employment injury.

Appellant submitted medical evidence dated between May and November 2018 from Dr. Jeffrey Wilson, a podiatrist, and Dr. Mark Berkowitz, a Board-certified orthopedic surgeon, relevant to her current condition and disability.³

On October 30, 2018 appellant requested reconsideration.

On March 2, 2019 appellant returned to full-time limited-duty employment.

By decision dated March 13, 2019, OWCP denied modification of the June 18, 2018 decision.

On July 22, 2019 OWCP expanded its acceptance of appellant's claim to include an incisional hernia and a surgical neuroma of the cutaneous nerve. On December 16, 2019 it expanded its acceptance of the claim to include left ankle instability and left leg peroneal tendinitis.

On March 4, 2020 appellant underwent an OWCP-authorized left leg four compartment fasciotomy and lateral ankle stabilization. OWCP paid her wage-loss compensation for total disability beginning March 4, 2020.

By decision dated April 8, 2020, OWCP denied modification of its March 13, 2019 decision denying appellant's claim for disability from July 22 through December 14, 2017.

On May 27, 2020 OWCP expanded its acceptance of the claim to include delayed wound healing of the left ankle.

On August 10, 2020 OWCP referred appellant to Dr. David K. Halley, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that he address her current condition and disability.

In a report dated September 4, 2020, Dr. Halley discussed appellant's history of injury and provided his review of the medical evidence of record. On examination he diagnosed possible continued compartment syndrome, good lateral and anterior stability, and continued left peroneal tendinopathy. Dr. Halley found no residuals of the left fibula fracture or evidence of an incisional hernia and decreased sensation at the superficial peroneal nerve. He opined that appellant could perform sedentary employment with limitations that included alternating sitting and standing every hour, and lifting no more than 10 pounds. Dr. Halley advised a review of the medical evidence suggested that appellant had compartment syndrome "more than likely" resulting from her employment injury and resulting surgery. He opined that she was totally disabled from October 21, 2019 to March 4, 2020.

³ On October 16, 2018 OWCP referred appellant to Dr. Ralph Rohner, Jr., a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated November 12, 2018, Dr. Rohner diagnosed a healed left fibular closed fracture, incisional muscle hernia, and surgical neuroma of the cutaneous nerve of operative field, which he found were causally related to the accepted employment injury. He found that appellant required further surgery for the muscle hernia and cutaneous neuroma and provided work restrictions.

On October 1, 2020 OWCP found that appellant was entitled to wage-loss compensation due to disability from employment for the period October 21, 2019 to March 4, 2020.

On October 20, 2020 appellant requested reconsideration. She contended that the report from Dr. Halley was sufficient to establish that she had limitations since 2017 due to her accepted employment injury.

By decision dated December 1, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a). It found that on April 8, 2021 appellant, through counsel, requested reconsideration of OWCP's April 8, 2020 decision. Counsel contended that the September 4, 2020 report of Dr. Halley diagnosed additional employment-related conditions and was therefore sufficient to show that appellant had additional medical conditions causally related to her accepted employment injury and was, thus, relevant to the issue of whether she had established disability from employment for the claimed dates. In the alternative, he asserted that OWCP should request an addendum report from Dr. Halley addressing the specific claimed periods of disability.

By decision dated June 25, 2021, OWCP denied appellant's request for reconsideration of its April 8, 2020 decision as she had not raised an argument or submitted evidence sufficient to warrant reopening her case for further review of the merits under 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens

⁴ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁵ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁶ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

and reviews the case on its merits.⁷ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

In her timely request for reconsideration, counsel contended that Dr. Halley, an OWCP referral physician, diagnosed additional employment-related conditions in his September 4, 2020 report and that his opinion was, therefore, relevant to the issue of whether she had established employment-related disability for periods prior to his report. He further asserted that OWCP should have requested an addendum opinion from Dr. Halley addressing the specific claimed periods of disability. The Board finds that appellant's argument that Dr. Halley's report was sufficient to require additional development of the medical evidence is new and relevant to the underlying issue of whether appellant has established disability from work for the period July 22 to December 14, 2017 causally related to her January 26, 2017 employment injury.⁹ The legal argument, thus, requires reopening of appellant's claim for merit review pursuant to the second prong of section 10.606(b).¹⁰

Consequently, the Board finds that OWCP improperly denied merit review pursuant to 20 C.F.R. § 10.608. The case shall, therefore, be remanded to OWCP for consideration of the merits of appellant's claim, to be followed by an appropriate merit decision.¹¹

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

⁷ *Id.* at § 10.608(a); *see also* *F.V.*, Docket No. 18-0239 (issued May 8, 2020); *M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *Y.K.*, Docket No. 18-1167 (issued April 2, 2020); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *K.N.*, Docket No. 20-1188 (issued July 20, 2021); *J.H.*, Docket No. 20-1312 (issued April 26, 2021).

¹⁰ *K.N.*, *id.*

¹¹ *V.S.*, Docket No. 20-0502 (issued December 31, 2020).

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 18, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board